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Supreme Court, U.S.
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In The

Supreme Court of the United States

H/N PLANNING & CONTROL, INC.,

Petitioner,

v.

CITY OF ST. PETERS and TOM BROWN, Mayor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit's reversal of a judgment in Petitioner's favor based upon standing to sue was an incorrect application of the "prudential standard" of "hindrance" from this Court's decision in *Powers v. Ohio* as an absolute rule, and in conflict with this Court's decision in *Warth v. Seldin*, which allows multi-party plaintiff claims, where Petitioner was the direct target of First Amendment retaliation and the one exercising his free speech participated in the suit.

RULE 29.6

Petitioner, pursuant to Rule 29.6, states that it is a privately held company. There is no publicly held corporation that owns more than 10% of its stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 535 F. 3d 899 (8th Cir. 2008).

JURISDICTION

The decision of the United States Court of Appeals, Eighth Circuit, reversing the district court's judgment, was handed down on July 30, 2008. A timely petition for rehearing was denied on September 22, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner H/N Planning & Control, Inc. ("H/N") brings this case before the Court to reverse an opinion of the Eighth Circuit which has reversed a jury verdict and judgment in its favor exceeding 1.5 million dollars on the sole basis of standing to sue. The Eighth Circuit held that because Brian Hodak participated in the lawsuit by bringing his own First Amendment claim, there could be no jurisdiction over H/N to sue for its distinct injuries caused by the same First Amendment violation.

Brian and Karla Hodak are husband and wife. Karla Hodak is the president and sole shareholder of H/N. Brian is the comptroller of the corporation. H/N owned and operated a restaurant and bar known as C. Blake's Bar & Grill ("C. Blake's"), in the city of St. Peters, Missouri, beginning in April 1997. Both Brian and Karla worked at C. Blake's. Karla held a liquor license in her name issued by the city of St. Peters to operate C. Blake's. (App. 2)

Between October 2000 and May 2001, Brian wrote five letters to the editors which were published in a local newspaper. The letters criticized the city of St. Peters Board of Aldermen and the city's mayor, Tom Brown, on issues of tax increment financing districts, storm water drain costs, a municipal judicial candidate, high tax rates, and due process violations. (App. 3-5)

On November 1, 2001, Mayor Tom Brown entered C. Blake's and told Brian, "Well, Brian, there are

people in this city who don't like what you've been saying, and you're an important businessman, and a lot of people listen to what you say, and we in St. Peters, we stick together. So if you don't keep your mouth shut, your wife's going to get her liquor license revoked." Brown then made a similar statement to Karla, stating that "we in the City of St. Peters know how to stick together" and adding that Brian was "alienating us boys and it's going to cost you your license." (App. 4, 5)

On February 6, 2002, another of Brian's letters to the editor was published which was harshly critical of Tom Brown and the Board of Aldermen for denying a permit to open a gas station by BP Amoco. Brown was quoted in the newspaper for denying the permit because he did not like the corporate colors of BP Amoco, green and yellow. BP Amoco filed suit over the denial. Brian's published letter stated, "If Tommy [Brown] thinks he can subvert due process relative to BP Amoco, who's next?" He signed his name along with "C. Blake's Bar and Grill." On February 7, 2002, Brown called Karla and said, "Tell your fucking husband to shut up or you're going to lose your fucking liquor license." (App. 5)

C. Blake's had operated for four years, six months, and eighteen days without a single liquor license violation from the city of St. Peters, and only began receiving assessment of points after Brown's November 2001 threats to Karla and Brian. Between November 2001 and May 2002, the city of St. Peters liquor commission and Board of Aldermen assessed

various points against the liquor license of Karla Hodak, and on June 13, 2002, a revocation hearing conducted by Mayor Tom Brown and the Board revoked the liquor license. C. Blake's was forced out of business because of the license revocation. (App. 4-6)

Brian and Karla both filed suit alleging violation of the First Amendment pursuant to 42 U.S.C. § 1983. Brian sought damages for mental and emotional distress and humiliation. Karla sought damages for lost profits from the revocation of her liquor license and the forced closure of C. Blake's Bar & Grill. Additional claims were brought for due process violations and police misconduct, claims which are no longer relevant to this case. (App. 6)

The First Amendment claim was tried successfully twice before a jury. In the first trial, Petitioner H/N was substituted as the party-plaintiff for Karla because although it was Karla's liquor license which was revoked, the damages flowed to the corporation. The claim of Brian Hodak was not submitted by the Plaintiffs to the jury by their own choice. The jury returned a verdict in favor of Petitioner H/N in the amount of $266,000.00, for past lost profits. No punitive damage instruction was given in the first trial. Defendants Brown and the city of St. Peters requested a new trial due to the substitution of Petitioner H/N, for Karla Hodak. The district court granted the motion. (App. 6, 7)

In the second trial, the jury awarded Petitioner $375,000.00 in past lost profits, and $1,000,000.00 in punitive damages against Tom Brown, individually. On the claim of Brian Hodak, the jury found that his First Amendment rights had been violated, but awarded no damages. A request for nominal damages was made on behalf of Brian Hodak after return of the verdict, but the district court denied the request. Judgment was entered on the verdicts and an award of attorney's fees and costs was entered in the amount of $179,000.00. Defendants appealed the judgment entered on behalf of Petitioner. Brian Hodak did not appeal the denial of the request for nominal damages. (App. 8, 9)

In the District Court, the issue of standing to sue by Petitioner was resolved in Petitioner's favor based upon the Eighth Circuit decision in *Park View Heights Corporation, et al. v. The City of Black Jack*, 467 F. 2d 1208 (8th Cir. 1972), a case cited approvingly by this Court in *Warth v. Seldin*, 422 U.S. 490, at 506 n. 17 (1975), which allowed multi-party plaintiff claims. The District Court also analyzed standing under the "prudential standard" of "hindrance" in *Powers v. Ohio*, 499 U.S. 400 (1991), and found that Brian Hodak was hindered in recovering the damages incurred by Petitioner H/N. (App. 24-31)

In the Eighth Circuit, the standing to sue of Petitioner was resolved against H/N because Brian Hodak had participated in the suit, and therefore,

there was no "hindrance" to the enforcement of the First Amendment violation under *Powers v. Ohio*.[1] The court held that the participation of Brian Hodak in the lawsuit prohibited jurisdiction over any other plaintiff. The court, in an alternative analysis, held that because no damages were awarded Brian Hodak by the jury, and no appeal was taken for the denial of nominal damages, his claim was non-existent and Petitioner H/N could not recover its damages because of that. No authority was cited or relied upon by the court for this latter proposition. (App. 9-17)

In both the District Court and Eighth Circuit, the Article III constitutional dimensions of Petitioner's standing to sue were resolved in favor of H/N: a close relationship existed between the parties and H/N had suffered a distinct injury-in-fact. The conflict between the two courts standing analysis centered exclusively on the "prudential standard" of "hindrance" in *Powers v. Ohio*. That is now the issue before this Court.

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[1] The published opinion of the Eighth Circuit states that both parties had argued that *Powers v. Ohio* controlled the standing to sue analysis. The Petition for Rehearing or Rehearing En Banc filed by H/N however, made clear that the decision in *Powers* was never, at any time, in any document, cited or urged by H/N as the controlling authority. H/N had always asserted that standing to sue was controlled by the Eighth Circuit decision in *Park View Heights* and this Court's decision in *Warth*. (App. 37-51)

REASONS FOR GRANTING THE PETITION

THE DECISION OF THE EIGHTH CIRCUIT HAS APPLIED THE "PRUDENTIAL STANDARD" OF STANDING TO SUE IN *POWERS V. OHIO* AS AN ABSOLUTE RULE WHICH IS IN CONFLICT WITH THIS COURT'S DECISIONS ALLOWING MULTI-PARTY PLAINTIFF CLAIMS ARISING FROM THE SAME CONSTITUTIONAL VIOLATION

In the opinion of the Eighth Circuit, the court found that the "hindrance" "prudential standard" from *Powers v. Ohio* controlled the standing of Petitioner to sue. Because Brian Hodak had brought his own First Amendment claim for his damages, the court held there was no "hindrance" or "practical barrier" from the First Amendment rights of Brian Hodak being protected. The court, relying upon a trend within other circuits, held that participation in the lawsuit by the one whose rights were violated, conclusively and absolutely prohibited jurisdiction over any other party:

> "Other circuits agree that if a third party actually asserts his own rights, no hindrance exists, and third-party standing is improper. *See Philadelphia Marine Trade Ass'n-Int'l Longshoremen's Ass'n Pension Fund v. Comm'r*, 523 F. 3d 140, 145 (3d Cir. 2008) ("Here, however, the [third party] is not only willing to sue on its own behalf – it *has* sued."); *Benjamin*, 57 F. 3d at 106 ("Here, the injured party is clearly identified and has sufficient interest in the litigation . . . to

> pursue (and, in fact, has pursued) the action."); *Wedges/Ledges of Calif., Inc. v. City of Phoenix*, 24 F. 3d 56, 62 (9th Cir. 1994) ("[T]he very participation of the [third-party] in this suit demonstrates that there is no hindrance to [their] ability to protect their own interests."); *Knight v. Alabama*, 14 F. 3d 1534, 1554 (11th Cir. 1994) ("[N]ot only was there no obstacle to [the third parties] asserting their rights for themselves, but, in fact, they were already doing so.")." (App. 12, 13)

The premise relied upon by the Eighth Circuit – that participation of the one whose rights were violated eliminates all jurisdiction over all other parties, as an absolute rule, is precisely what this Court has instructed **not** to do in applying the "prudential standards" of standing to sue.

In *Kowalski, et al. v. Tesmer, et al.*, 543 U.S. 125 (2004), this Court reaffirmed the principle that "prudential standards" are not "absolute."

> "We have not treated this rule as absolute, however, recognizing that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another. But we have limited this exception by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a "close" relationship with the person who possesses the right. Powers v. Ohio, 499 U.S. 400, 411 (1991).

> Second, we have considered whether there is a "hindrance" to the possessor's ability to protect his own interests."
>
> "We have been quite forgiving with these criteria in certain circumstances. "Within the context of the First Amendment," for example, "the Court has enunciated other concerns that justify a lessening of prudential limitations on standing." Secretary of State of Md. v. Joseph H. Munson Co., supra, at 956. And "[i]n several cases, this Court has allowed standing to litigate the rights of third parties **when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights**." Warth v. Seldin, (citing Doe v. Bolton, 410 U.S. 179 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Barrows v. Jackson, 346 U.S. 249 (1953); see Craig v. Boren, 429 U.S. 190 (1976)." *Id.* at 129, 130

Similarly, in *Secretary of State v. Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984), this Court rejected "prudential standards" as an absolute rule and explained the limited purpose of a prudential standard:

> " . . . there are situations where competing considerations outweigh any prudential rationale against third-party standing, and that this Court has relaxed the prudential standing limitation when such concerns are present. Where practical obstacles prevent a party from asserting rights on behalf of

> itself, for example, the Court has recognized the doctrine of jus tertii standing. In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal. See, e.g., Craig v. Boren, 429 U.S. 190, 193-194, 97 S.Ct. 451, 454-455, 50 L.Ed.2d 397 (1976)." *Id.* at 956

Here, the very purpose of the "prudential standard" is obviated. The parties, Brian and Karla Hodak, are husband and wife. The corporation is owned by Karla. The corporation was the direct target of retaliation for Brian's exercise of free speech. Both Brian and Karla lost their livelihood by being put out of business by the Defendants. Every incentive in the world existed for both parties to properly frame the issues and present them with adversarial zeal. The "prudential standard" therefore should have been inapplicable to the corporation's standing to sue.

Moreover, this Court's decisions in *Warth v. Seldin, Griswold v. Connecticut, Barrows v. Jackson*, and *Craig v. Boren*, have made clear that when government action directly or indirectly violates the rights of third parties, then multi-party plaintiff claims are allowed. Petitioner H/N's case could not be more clearly aligned with that precedent. The Defendants had threatened to, and did, put Petitioner out of business because it was the only means by which,

as governmental officials, they could retaliate against Brian Hodak. Revocation of the liquor license caused Brian and Karla Hodak to lose everything. To apply the "prudential standard" of "hindrance" from *Powers v. Ohio*, in this instance would defy the very common sense practice of allowing multi-party claims and leave Petitioner with no remedy at all against Defendants.[2]

Finally, the Eighth Circuit opinion suggested that because judgment was not entered on behalf of the claim of Brian Hodak, based upon damages, then Petitioner had no claim to bring independently. No authority was cited at all for such a proposition. In fact, in *Naucke v. City of Park Hills*, 284 F. 3d 923 (8th Cir. 2002), the Eighth Circuit held the exact opposite. There the individual plaintiff exercising free speech had her claim eliminated by summary judgment because of insufficient damages of mental and emotional distress, but her husband and brother's claim were successfully pursued for retaliatory discharge from their employment. This Court's decision in *Powers* itself recognizes that third-party standing is often allowed, because of an absent injured party, due to a lack of stake in the outcome and little incentive

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[2] Under Missouri law, the Defendants are entitled to immunity unless they had purchased insurance specifically covering the claims sued upon, and even then, limited to the amount of insurance purchased. Revised Statutes of Missouri § 71.185, *Kunzie v. City of Olivette*, 184 S.W.3d 570 (Mo. banc 2006).

to pursue the claim. *Powers* at 414-15. There has never been a prerequisite in this Court that every party obtain a judgment of a rights violation before third-party standing is permitted. The lack of incentive to pursue a nominal damage award on behalf of Brian Hodak was clearly the reasoning here. Brian and Karla had obtained a 1.5 million dollar judgment against Defendants. They had obtained the purpose of the lawsuit. To pursue this litigation for over four years, with all of its attendant costs and time, only to recover the Pyrrhic victory of $1.00, was not the purpose.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-2590

Brian Hodak; Karla Hodak; H & N Planning and Control, Inc.,	* Appeal from the * United States District * Court for the Eastern * District of Missouri
Plaintiffs-Appellees,	*
v.	*
City of St. Peters; Tom Brown, Mayor,	*
Defendants-Appellants,	*
Timothy Kaiser, Sgt., DSN 184; R Treadway, Ofcr., DSN 2531; Charles Carson, Ofcr., DSN 297,	*
Defendants.	*

Submitted: February 13, 2008
Filed: July 30, 2008

Before MELLOY, GRUENDER and SHEPHERD, Circuit Judges.

GRUENDER, Circuit Judge.

Brian Hodak ("Brian") and H/N Planning & Control, Inc. ("H/N") sued the City of St. Peters,

Missouri ("City"), and its former mayor, Tom Brown ("Brown"), under 42 U.S.C. § 1983 for allegedly increasing police presence around a bar owned by H/N and ultimately revoking its liquor license in retaliation for Brian, the husband of H/N's sole shareholder, exercising his First Amendment right to free speech. A jury found for Brian and H/N, awarding no damages to Brian and $375,000 in compensatory damages and $1,000,000 in punitive damages to H/N. The district court granted the City's and Brown's renewed motion for judgment as a matter of law with respect to Brian's claim but denied the motion with respect to H/N and entered judgment in favor of H/N. The City and Brown appeal [sic], and we reverse.

I. BACKGROUND

We view the relevant background facts based upon the evidence presented at trial in a light favorable to the jury's verdict. *See Sellers v. Mineta,* 350 F.3d 706, 709 (8th Cir. 2003).

Karla Hodak ("Karla") was the president and sole shareholder of H/N, and her husband, Brian, was the corporation's comptroller. H/N opened C. Blake's Bar & Grill in St. Peters, Missouri, in April 1997. Karla and Brian were employees at C. Blake's. Karla held a liquor license issued by the City for H/N doing business as C. Blake's.

The City's Liquor Commission ("Commission") issues liquor licenses. It also has supervisory authority over licensees and their operations. The Commission determines whether to assess points against a liquor license for code violations, which could ultimately lead to the revocation of the license. The City's Board of Aldermen ("Board") has the authority to uphold or reject the assessment of points by the Commission. If a liquor license receives 6.5 points or more, the Commission may recommend to the Board that it revoke the liquor license. The Board then votes on whether or not to revoke the license. The Board consists of eight elected members. The mayor formally sits on the Board but only casts a vote in the event of a tie. Brown served as the City's mayor until 2004.

Between November 11, 2000, and May 28, 2001, Brian wrote five letters to the editor that were published in a local newspaper and were critical of the actions of the City and, by implication, Brown. The letters criticized tax increment financing districts, storm-water drain costs, a judicial candidate, and high tax rates.

On October 18, 2001, a customer at C. Blake's who had been quarreling with patrons was "cut off" from ordering more drinks and threw a bottle against a mirror. Brian removed the customer from the bar. An employee called the police, and Brian held the customer down until police arrived. Brian scuffled with the police officers who responded to the call. On October 30, 2001, the Commission voted to assess 2.0

points against the liquor license for this incident. On January 10, 2002, the Board upheld the assessment.

Brown entered C. Blake's on November 1, 2001, and told Brian, "Well, Brian, there are people in this city who don't like what you've been saying, and you're an important businessman, and a lot of people listen to what you say, and we in St. Peters, we stick together. So if you don't keep your mouth shut, your wife's going to get her liquor license revoked." Brown made a similar statement to Karla, noting that "we in the City of St. Peters know how to stick together" and adding that Brian was "alienating us boys and it's going to cost you your license."

After this threat, Brian and Karla claimed that police presence around C. Blake's increased. According to their testimony, police drove through the parking lot more often and frequently peered in the windows of C. Blake's. They also claimed that this increased police presence caused a reduction in profits for H/N in November 2001 and for the next several months.

On November 3, 2001, an employee at C. Blake's called the police after a customer threw a bottle through a window. Police located the suspect in the passenger seat of a nearby vehicle and arrested the driver of the vehicle for driving while intoxicated. The Commission assessed an additional 3.5 points against the liquor license for this incident. On December 8, 2001, police responded to a call from another employee at C. Blake's regarding an assault. Witnesses

to the assault included minors who had allegedly been served alcohol at the bar. The Commission assessed an additional 3.5 points against the license for serving minors.

Shortly thereafter, two more of Brian's letters were printed in the newspaper. On December 10, 2001, Brian's published letter criticized the local use tax. In a February 6, 2002 published letter, Brian criticized Brown for violating "due process" by denying a permit to a gas service station, which had resulted in a lawsuit against the City. In this letter, Brian concluded, "[I]f Tommy [Brown] thinks he can subvert due process relative to BP Amoco, who's next?" He signed his name along with "C. Blake's Bar and Grill." On February 7, 2002, Brown called Karla and said, "Tell your fucking husband to shut up or you're going to lose your fucking liquor license."

On March 7, 2002, C. Blake's remained open approximately five minutes past the mandatory closing time. The Commission assessed 3.5 points against the liquor license. On May 7, 2002, the Commission recommended revoking Karla's liquor license for H/N, doing business as C. Blake's, because it had accumulated 12.5 points, well above the 6.5 point threshold. A revocation hearing before the Board was set for June 13, 2002. On that day, H/N sold the assets of C. Blake's to Mid Rivers Management, Inc. That evening, Brian appeared before the Board in order to defend the liquor license. Prior to the hearing, Brown instructed an alderwoman to make the motion to revoke the liquor license. At the conclusion

of the hearing, the Board upheld the points assessed and voted 6-0 in favor of revocation, with two Board members absent. After the revocation, the unusual police presence around C. Blake's allegedly stopped.

Brian and Karla brought suit under § 1983 against the City, Brown and three city police officers. They alleged that the City and Brown increased police presence around C. Blake's and ultimately revoked Karla's liquor license in retaliation for Brian's critical letters to the editor, which violated Brian's First Amendment right to free speech. They also alleged that the City and Brown violated their procedural due process rights under the Fourteenth Amendment by failing to give them a fair hearing before revoking the liquor license. Finally, they asserted four claims against three police officers alleging police misconduct during the October 18, 2001 incident at C. Blake's. The district court granted the defendants' motion for summary judgment on the procedural due process claim because the Hodaks failed to exhaust state remedies and on two of the police misconduct claims because the officers' actions were reasonable.

On March 6, 2006, a jury trial commenced on the First Amendment retaliation claim and the two remaining police misconduct claims. At the close of evidence, the City and Brown moved for judgment as a matter of law on the retaliation claim, arguing that the Hodaks' damages evidence was based solely on lost profits of H/N, which was not a party to the lawsuit. In response, the Hodaks moved to substitute

H/N for themselves. The district court granted the motion and substituted H/N for the Hodaks on the retaliation claim before submitting the case to the jury. The jury then found for H/N on the retaliation claim and found for the police officers on the two misconduct claims. After the jury verdict in H/N's favor, the district court granted the City's and Brown's motion for a new trial because it concluded that they had been prejudiced by the late substitution of H/N as the plaintiff.

Prior to the retrial, a third amended complaint was filed in which both Brian and H/N, but not Karla, asserted only the First Amendment retaliation claim. The City and Brown moved for judgment on the pleadings against H/N, contending that H/N lacked standing to bring a claim for Brian's First Amendment activity. The district court rejected this argument and concluded that H/N had standing to assert a claim based on a violation of Brian's rights. Pursuant to the three-part analysis set forth in *Powers v. Ohio,* 499 U.S. 400, 411 (1991), the district court concluded that H/N suffered an injury in fact, that H/N had a close relation to Brian, and that Brian was hindered in protecting his own interests. The district court reasoned that Brian was "hindered" from protecting his own interests because of "the lack of economic injury to himself," which "prevent[ed] Plaintiff Brian Hodak from protecting his own first amendment rights." *Hodak v. City of St. Peters,* 2006 WL 3004052, at *6 (E.D. Mo. Oct. 20, 2006). Therefore, the district court reasoned, even though H/N did

not engage in First Amendment activity, it had standing to assert a claim based on Brian's First Amendment rights.

At the second trial, the jury found that the City and Brown improperly retaliated against Brian and H/N based on Brian's exercise of his First Amendment right to free speech. The jury did not award Brian any damages, but it awarded H/N $375,000 in compensatory damages and $1,000,000 in punitive damages. Brian requested, for the first time, that the district court award him nominal damages, and the district court refused. In a post-trial motion, the City and Brown renewed their motion for judgment as a matter of law. The City and Brown argued that Brian suffered "no adverse action sufficient to quell Brian Hodak's speech." The district court granted the City's and Brown's motion with respect to Brian, reasoning that Brian's "testimony regarding the emotional impact [to Brian] of the threats of Defendant Brown, and the eventual revocation of Karla Hodak's liquor license are not sufficiently severe so as to raise to the level of an actionable constitutional violation." *H/N Planning & Control, Inc. v. City of St. Peters*, ___ F. Supp. 2d ___, 2007 WL 1445121, at *11 (E.D. Mo. May 14, 2007). Because Brian did not suffer an "actionable constitutional violation," the district court concluded that the City and Brown were entitled to judgment as a matter of law with respect to Brian's claim. Brian did not appeal the district court's decision, and H/N has not challenged that judgment on appeal.

In their renewed motion for judgment as a matter of law, the City and Brown also argued that H/N, which conceded it did not engage in protected speech under the First Amendment, lacked standing to assert a claim based on Brian's First Amendment rights. The district court rejected this argument again, citing its earlier analysis of the issue. Regarding the third prong of the standing analysis, the district court concluded that Brian was "hindered" because he "cannot protect this interest, as he suffered no damages." *Id.*

The district court rejected the remainder of the City's and Brown's arguments and sustained the jury's verdict and damage awards in favor of H/N. The district court also awarded H/N attorney's fees under 42 U.S.C. § 1988. The City and Brown appeal the judgment against them and in favor of H/N.

II. DISCUSSION

The City and Brown argue that the district court should have dismissed H/N's claim, which was based solely on Brian's First Amendment activity, for lack of standing. "Standing is a threshold inquiry and jurisdictional prerequisite that must be resolved before reaching the merits of a suit." *Medalie v. Bayer Corp.*, 510 F.3d 828, 829 (8th Cir. 2007) (internal quotations omitted).

"We review the district court's conclusion that the plaintiff[ ] had standing de novo." *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006) (italics omitted). In

order to have standing, a party must have a "case or controversy" under Article III of the Constitution. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The "irreducible constitutional minimum of standing" consists of three elements. *Id.* at 560. First, a party must have suffered an "injury in fact," an actual or imminent concrete and particularized invasion to a legally protected interest; second, the injury must be fairly traceable to the challenged action of the defendant; and third, the injury must be redressable by a favorable decision. *Id.*

"Even if a plaintiff meets the minimal constitutional requirements for standing, there are prudential limits on a court's exercise of jurisdiction." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County,* 115 F.3d 1372, 1378 (8th Cir. 1997). As a general rule, a plaintiff may only assert his own injury in fact and "cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 498-99 (1975). H/N concedes that it did not engage in any speech protected under the First Amendment, but it claims that it has "third-party standing" to assert Brian's First Amendment rights.[1] Third-party standing is an exception to the general rule that a plaintiff may only assert his own injury in fact and permits a litigant who lacks a legal claim to assert the rights of a third party. *See Ben*

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[1] Even though Brian signed his final letter with his name and "C. Blake's Bar and Grill," H/N does not argue that the City and Brown retaliated against it as if it were the speaker.

Oehrleins, 115 F.3d at 1381; *see also* 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3531.9, at 542-43 (2d ed. 1984).[2]

The parties urge us to apply the three-part analysis in *Powers,* as the district court did, to determine whether H/N has third-party standing. In *Powers,* a juror in a criminal trial was discriminated against on the basis of race in violation of the Fourteenth Amendment. 499 U.S. at 412. The Supreme Court allowed the criminal defendant to assert the rights of this third party under a three-part analysis. The Court concluded that the criminal defendant suffered an injury in fact, that he had a close relation to the juror, and that the juror was hindered in his ability to protect his own interests. *Id.* at 411.

The test for "hindrance" is a question of "the likelihood and ability of the third parties . . . to assert their own rights." *Id.* at 414. "[A] party must show that some barrier or practical obstacle (e.g., third party is unidentifiable, lacks sufficient interest, or will suffer some sanction) prevents or deters the third party from asserting his or her own interest." *Benjamin v. Aroostook Medical Ctr., Inc.,* 57 F.3d 101, 106 (1st Cir. 1995) (italics omitted). In *Powers,* the

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[2] When analyzing third-party standing, the "third party" is the party whose rights are at issue. In this case, H/N is the litigant, the City and Brown are the defendants, and Brian is the "third party." H/N seeks to assert "third-party standing," standing to assert the rights of Brian.

"barriers to a suit" that constituted a hindrance included "practical barriers," such as the "small financial stake involved and the economic burdens of litigation." 499 U.S. at 414-15.

No practical barriers exist if the third party actually asserts his own rights. In *Ben Oehrleins*, for instance, a local ordinance required waste to be deposited in designated facilities. Waste haulers brought suit to strike down the ordinance on the basis that it violated the Commerce Clause. "Waste generators," customers of waste haulers, also sued, asserting third-party standing to bring the Commerce Clause claims of the waste haulers. We concluded that "there is no indication that allowing standing to the generators 'is necessary to insure protection of the rights asserted.'" *Ben Oehrleins*, 115 F.3d at 1381 (quoting *Warth*, 422 U.S. at 510). "That the hauler plaintiffs brought suit more than a year before the generator plaintiffs (and indeed share the same counsel) and have aggressively litigated their own claims demonstrates that they are fully capable of asserting their own rights." *Id.* Because the haulers asserted their own claims, the generators could not establish that the haulers were hindered in asserting their rights, and we denied the litigants third-party standing. *Id.*

Other circuits agree that if a third party actually asserts his own rights, no hindrance exists, and third-party standing is improper. *See Philadelphia Marine Trade Ass'n – Int'l Longshoremen's Ass'n Pension Fund v. Comm'r*, 523 F.3d 140, 145 (3d Cir. 2008)

("Here, however, the [third party] is not only willing to sue on its own behalf – it *has* sued."); *Benjamin,* 57 F.3d at 106 ("Here, the injured party is clearly identified and has sufficient interest in the litigation . . . to pursue (and, in fact, has pursued) the action."); *Wedges/Ledges of Calif., Inc. v. City of Phoenix,* 24 F.3d 56, 62 (9th Cir. 1994) ("[T]he very participation of the [third party] in this suit demonstrates that there is no hindrance to [their] ability to protect their own interests."); *Knight v. Alabama,* 14 F.3d 1534, 1554 (11th Cir. 1994) ("[N]ot only was there no obstacle to [the third parties] asserting their rights for themselves, but, in fact, they were already doing so.").

Assuming that H/N suffered an injury in fact and that it had a close relation to Brian, we conclude that H/N cannot establish that Brian was hindered from protecting his own interests. Brian had no practical obstacles that prevented him from bringing his First Amendment claim. In fact, he brought his own claim before the district court, and his participation in the lawsuit demonstrates that he was not hindered from asserting his own rights. *See Ben Oehrleins,* 115 F.3d at 1382. Although the district court ultimately concluded that Brian lacked direct economic injury, it obviously did not prevent Brian from asserting his own rights in the original § 1983 action. He voluntarily withdrew himself as a named plaintiff in the first trial, but prior to the second trial, in the third amended complaint, Brian asserted his First Amendment retaliation claim yet again. He persisted in the

claim throughout the second trial, and the jury found in his favor but awarded no damages.

Brian might have believed that he could establish economic damages before filing the lawsuit, or he might have believed that nominal damages and an award of attorney's fees would be sufficient incentive to assert his own rights. *See Advantage Media, L.L.C. v. City of Eden Prairie,* 456 F.3d 793, 802 (8th Cir. 2006) (acknowledging that a plaintiff may receive nominal damages and attorney's fees for a First Amendment violation). Regardless, at the outset of litigation, Brian chose to assert his own rights, and no practical obstacles hindered him from doing so. The district court did not reject Brian's claim until it concluded that he did not suffer an actionable constitutional violation and granted the defendants' post-trial motion for judgment as a matter of law. Under these circumstances, we conclude that Brian was likely and able to assert his own rights and was not hindered in doing so. Therefore, the district court erred in extending third-party standing to H/N.[3]

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[3] The district court relied upon *Camacho v. Brandon,* 317 F.3d 153 (2d Cir. 2003), in its third-party standing analysis. This Second Circuit case concluded that the third party was "hindered" from seeking redress because of "the absence of any direct economic harm to him," which permitted the litigant to assert the third party's First Amendment retaliation claim. *Id.* at 160. In *Camacho,* however, the third party never filed suit and was "inhibited from seeking redress for these injuries," unlike this case, in which Brian did assert his own rights and sought redress. *See id.*

Even if we were to conclude that Brian was hindered in asserting his rights, we would conclude that H/N lacks standing nonetheless. The Supreme Court has required that a litigant must actually assert the rights of the third party, supported by allegations in the record, in order for a litigant to have third-party standing. *McGowan v. Maryland,* 366 U.S. 420, 429 (1961). In *McGowan,* the plaintiffs were employees of a department store who had been convicted for violating Sunday "blue laws." They attempted to challenge the blue laws as violating the Free Exercise Clause of the First Amendment, but they failed to allege "any infringement of their own religious freedoms." *Id.* They then sought to establish third-party standing based on the First Amendment rights of their customers, but the record lacked any allegation "that the statutes infringe upon the religious beliefs of the department store's present or prospective patrons." *Id.* The record did not contain allegations sufficient to assert the rights of the third party, and the Supreme Court held that the employees did not have third-party standing to bring a claim based on the rights of the customers. *Id.* Therefore, if a litigant wholly fails to assert the rights of the third party, the litigant lacks third-party standing.

We would find no difficulty in extending that principle to this case on appeal, in which the district court has concluded that the third party, Brian, does not have any rights at stake because it determined that there was no actionable constitutional violation. Brian has not appealed the district court's judgment

against him, and H/N makes no argument on appeal that Brian has any rights he could assert.[4] In fact, H/N insisted at oral argument that it was "not necessarily" the case that Brian must have an actionable constitutional violation in order for H/N to establish third-party standing. Brian has no rights that H/N may assert, and we would decline to extend third-party standing to H/N to assert Brian's nonexistent legal claim.

Because H/N does not have third-party standing, the City and Brown are entitled to judgment as a matter of law. The district court awarded H/N, as the prevailing party, attorney's fees under 42 U.S.C. § 1988. Because we reverse the verdict, H/N is no longer the prevailing party, and, therefore, we vacate the district court's attorney's fees award. *See Clark v.*

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[4] Brian might have been able to establish a constitutional violation in different ways. For example, he could have shown that a person of ordinary firmness would have been chilled from engaging in speech. *See Naucke v. City of Park Hills,* 284 F.3d 923, 927-28 (8th Cir. 2002). He could have shown a reasonable apprehension that his wife might be economically disadvantaged in retaliation for his speech. *See Int'l Ass'n of Firefighters v. City of Ferguson,* 283 F.3d 969, 973 (8th Cir. 2002). He also could have shown that the alleged retaliation carried out against his wife resulted in an "actual or potential inhibitory effect" on his speech. *See Thompson v. Adams,* 268 F.3d 609, 614 (8th Cir. 2002). Nevertheless, Karla was not a party in the second trial, Brian does not appeal the district court's adverse judgment, and H/N does not raise these issues on appeal. Therefore, we do not reach these issues.

Kansas City Mo. Sch. Dist., 375 F.3d 698, 703 (8th Cir. 2004).

III. CONCLUSION

For the reasons stated above, we reverse and remand the case to the district court with instructions to vacate the judgment in favor of H/N and dismiss H/N's complaint for lack of jurisdiction.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BRIAN HODAK, et al.,	)	
Plaintiff(s),	)	
	)	
vs.	)	Case No. 4:04cv01099 ERW
CITY OF ST. PETERS, et al.,	)	
	)	
Defendant(s).	)	

MEMORANDUM AND ORDER

(Filed Oct. 20, 2006)

This matter comes before the Court upon Defendants' Motion for Judgment on the Pleadings Against Plaintiff H/N Planning and Control, Inc. ("Plaintiff H/N") on Count I of the Third Amended Complaint [doc. # 145].[1]

I. PROCEDURAL HISTORY

Brian and Karla Hodak filed suit against the City of St. Peters and former Mayor Tom Brown, among others, on August 19, 2004, seeking damages

[1] The Plaintiffs' Third Amended Complaint contains Counts I through VI. However, Counts II through VI were decided in Defendants' favor, either on Summary Judgment or judgment on the Jury Verdict. The only Count remaining for retrial is Count I, and this is the only Count subject to the Defendants' Motion for Judgment on the Pleadings.

pursuant to the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1983, 1985(3) and 1988. In Count I, Plaintiff H/N alleges that Defendant City of St. Peters and Defendant Brown retaliated against Plaintiff Brian Hodak for the exercise of his First Amendment rights of free speech by placing marked cars and uniformed officers in the immediate vicinity outside of C. Blake's Bar and Grill ("Bar"), and thereafter, revoking the liquor license of Karla Hodak, which prohibited liquor to be sold at the Bar. Defendants filed a motion for summary judgment on December 9, 2005. The Court denied the motion as to Count I, finding that a reasonable fact-finder could find that Defendants retaliated against Plaintiffs based on Plaintiff Brian Hodak's criticism of Mayor Brown and other city officials.

After a six day jury trial, starting on March 6, 2006, and following the introduction of all evidence, Defendants made a Motion for Judgment as a Matter of Law. Defendants argued that (1) under the rule propounded by the court in *Potthoff v. Morin*, 245 F.3d 710 (8th Cir. 2001), Karla and Brian Hodak did not have standing to sue for injuries sustained by H/N; (2) the revocation of the liquor license was not an "adverse action" as required in order for Defendants' actions to constitute retaliation, since Plaintiffs failed to exhaust their administrative remedies; (3) there was no causal connection between the adverse action and the protected speech activity; and (4) the City of St. Peters is entitled to sovereign immunity.

After Defendants argued their Motion, Plaintiffs made an oral motion to add H/N as a plaintiff in the case. The Court granted the Motion, and H/N was added as the plaintiff in Count I. Counsel then made closing arguments to the jury and the jury returned a verdict in favor of Plaintiff H/N on the First Amendment retaliation claim in Count I. On March 23, 2006, Defendants filed a Motion for Judgment as a Matter of Law After Trial, renewing the arguments made in their Motion for Judgment as a Matter of Law at the close of all evidence, or in the alternative a New Trial. This Court granted Defendants' Motion for a New Trial as to Count I on July 26, 2006.

This Court also granted Plaintiffs' Motion for Leave to file a Second Amended Complaint on July 27, 2006, and granted Plaintiffs Motion for Leave to file a Third Amended Complaint on August 23, 2006. Plaintiffs Third Amended Complaint added Plaintiff Brian Hodak as a party to Count I as well as Plaintiff H/N. Defendants then filed the instant Motion for Judgment on the Pleadings against Plaintiff H/N on Count I of Plaintiffs' Third Amended Complaint.

I. [sic] FACTUAL BACKGROUND[2]

Plaintiff Karla Hodak is the sole shareholder of H/N Planning and Control, Inc. ("H/N"). On April 1,

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[2] As this is a motion for judgment on the pleadings the Court's recitation of the facts is taken from Plaintiffs' Third Amended Complaint.

1997, H/N began operating a business known as C. Blake's Bar & Grill, the Bar, in St. Peters, Missouri, with a duly issued liquor license, in the name of Karla Hodak. Plaintiffs Brian and Karla Hodak operated the Bar. Their operation continued without incident from April 1, 1997 until October 18, 2001. Beginning in November, 2000, Plaintiff Brian Hodak was a vocal critic of local government officials, including the mayor at the time, Tom Brown. He wrote several letters to the editor of the local paper criticizing the Mayor's activities.

According to Plaintiffs' allegations, on or about November 1, 2001, Mayor Tom Brown appeared at the Bar and told both Plaintiffs Brian and Karla Hodak that if Plaintiff Brian Hodak did not stop criticizing him regarding the tax increment financing plans and other matters, he would see to it that they lost their liquor license. On February 6, 2002, Plaintiff Brian Hodak criticized Mayor Brown in a letter to the editor, alleging that he had denied BP Amoco's due process regarding a use permit and that the Mayor's denial of due process needlessly cost the taxpayers money defending a lawsuit initiated by BP Amoco. Plaintiffs allege that on February 7, 2002, the day following the letter's publication, Mayor Brown called and told Plaintiff Karla Hodak to tell Plaintiff Brian Hodak to "keep his . . . mouth shut or you're going to lose your liquor license."

Plaintiff further alleges that between December, 2001 and May, 2002, Plaintiffs received notices that points were being assessed against their liquor

license for events which had not been cited as violations prior to October 18, 2001. Between October, 2001 and March, 2002, the Commission assessed 12.5 points against the Bar's liquor license for various violations. One incident cited by the Plaintiffs occurred on October 18, 2001, when Plaintiff Brian Hodak and Mr. Fitchett, a bar patron were arrested fo [sic] peace disturbance and assault. Plaintiff Brian Hodak was later acquitted of all charges, but the points assessed against Plaintiff H/N from this incident were not removed. On June 13, 2002, the Board held a hearing regarding the revocation of Plaintiffs' liquor license, where the Defendant Mayor Brown presided, and the liquor license was revoked.

III. STANDARD OF REVIEW

Rule 12(c) of the Federal Rules of Civil Procedure provides that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c) (2006). In deciding a motion for judgment on the pleadings, this Court will accept as true all facts pled by the non moving party, and "grant all reasonable inferences from the pleadings in the non-moving party's favor." *National Car Rental System, Inc. v. Computer Associates Intern., Inc.*, 991 F.2d 426, 428 (8th Cir. 1993). This is a strict standard: "judgment on the pleadings is not appropriate unless the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." *U.S. v. Any*

and All Radio Station Transmission Equipment, 207 F.3d 458, 462 (8th Cir. 2000), *see also National Car Rental Systems, Inc.*, 991 F.2d at 428.

IV. DISCUSSION

Plaintiffs' bring suit against Defendants alleging a violation of their constitutional rights because Defendants actions constituted retaliation against the Plaintiff Brian Hodak for activity protected by the First Amendment of the United States Constitution. *Pl. Third Amended Complaint*, ¶40. In order

> [t]o state a First Amendment retaliation claim under 42 U.S.C. § 1983, the plaintiff must show (1) he engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity.

Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004). The present case requires this Court to address the ability of Plaintiff H/N to bring an action against Defendants on the basis of Plaintiff Brian Hodak's protected activity. Plaintiffs' Third Amended Complaint alleges that Plaintiff Brian Hodak exercised his First Amendment rights and that the Defendants retaliated against him by "placing marked cars and uniformed officers in the immediate vicinity outside of the restaurant, and thereafter, revoking the liquor license of Plaintiff H/N." *Pl.'s Third*

Amended Complaint, ¶40. The key question in deciding the current motion is whether Plaintiff H/N can raise the violation of Plaintiff Brian Hodak's constitutional rights.

A. STANDING

Defendants raise two arguments in favor of their position that Plaintiff H/N does not have standing. First, Defendants argue that Plaintiff H/N has not alleged any facts that Plaintiff H/N engaged in any protected activity, but rather that Plaintiff Brian Hodak engaged in protected activity. *Def. Memo. In Support of Def. Mot. for Judg. on the Pleadings*, 4. Second, Defendants argue that Plaintiff H/N does not have standing because the alleged retaliation was against Plaintiff Brian Hodak, not against Plaintiff H/N. *Def. Memo. In Support of Def. Mot. for Judg. on the Pleadings*, 9. Plaintiffs respond by alleging that the protected speech of Brian Hodak, and the subsequent retaliation against him, is sufficient to provide standing to Plaintiff H/N, as Plaintiff H/N suffered an economic injury which resulted from Plaintiff Brian Hodak's protected action, and further that Plaintiff Brian Hodak could not have alleged the injury himself because Plaintiff Brian Hodak did not suffer any direct economic harm. *Pl. Memo in Opp. to Def. Mot. for Judg. on the Pleadings*, 2.

Standing has both constitutional and prudential dimensions. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (holding that standing "involves both constitutional

limitations on federal-court jurisdiction and prudential limitations on its exercise"); *see also Starr v. Mandanici*, 152 F.3d 741, 749 (8th Cir. 1998). Article III of the United States Constitution limits the subject-matter jurisdiction of federal courts to "cases" and "controversies." U.S. Const. Art. III, § 2. A plaintiff must demonstrate "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, . . . and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Miller v. Block*, 771 F.2d 347, 352 (8th Cir. 1985) (internal quotations omitted). Specifically, a plaintiff must establish three elements to satisfy "the irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Lujan, 504 U.S. at 560-561.

Plaintiff H/N must be able to show that it meets the minimum requirements of standing under Article III. The plaintiff must have suffered an "injury in fact." *Id.* at 560-561. Here Plaintiff H/N alleges that it lost its liquor license as a result of the retaliation by the Defendants. This is clearly a particularized injury, which resulted in economic harm to Plaintiff H/N and the eventual closing of the Bar owned by Plaintiff H/N. "[T]here must be a causal connection between the injury and the conduct complained of. . . ." *Id.* Plaintiff H/N alleges that the Mayor and the Board of Alderman for the City of St. Peters, the Defendants in this case, acted to place marked cars in front of its business, and further caused Plaintiff H/N's liquor license to be revoked, therefore Plaintiff H/N has alleged a causal connection between the economic injury and the action of retaliation by the Defendants. "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* A favorable decision by a jury in this case will result in damages to Plaintiff H/N for the economic loss suffered as a result of the loss of its liquor license. As the three requirements for Article III standing have been met, it is necessary for the Court to look at the prudential requirements.

"The second category of self-imposed standing limitations are prudential principles which underscore the limitations embodied in Article III." *Miller*, 771 F.2d at 352. "The prudential principles of standing ensure that federal courts are not called upon to decide questions of broad social import in cases in

which no individual rights will be vindicated, and [that] access to the federal courts [is] limited to those litigants best suited to assert the claims." *Starr*, 152 F.3d at 749 (internal quotations omitted). The prudential limitation applicable to the present case is the principle that "even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 498-499; *Potthoff v. Morin*, 245 F.3d 710, 715 (8th Cir. 2001) (internal quotations omitted); *see also Mosby v. Ligon*, 418 F.3d 927, 933 (8th Cir. 2005).

An exception to this prudential limitation exists when a third party meets three additional criteria.

> The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Powers v. Ohio, 499 U.S. 400, 411 (1991) (internal citations omitted); *Camacho v. Brandon*, 317 F.3d 153, 159 (2nd Cir. 2003) ("[a] plaintiff may assert the constitutional claims of a third party if the plaintiff can demonstrate: (1) injury to the plaintiff, (2) a close relationship between the plaintiff and the third party that would cause plaintiff to be an effective advocate for the third party's rights, and (3) some hindrance to

the third party's ability to protect his or her own interests."); *see also Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004); *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1381-82 (8th Cir. 1997) (court did not relax the prudential bar because generators of waste d'd not have close relationship with haulers); *Mosby*, 418 F.3d at 934 (black attorney lacked standing to assert interests of other black attorneys because no close relationship between plaintiff and other black attorneys, and, moreover, there was no evidence that there was a hindrance to the other attorneys' ability to protect their interests).

Plaintiff H/N relies upon this exception. Plaintiff H/N must have alleged facts to show it suffered an injury in fact to give it a concrete interest in the outcome, that there is a close relationship between Plaintiff H/N and Plaintiff Brian Hodak, and that there is some hindrance to Plaintiff Brian Hodak asserting his own constitutional rights. *Powers*, 499 U.S. at 411. As the Supreme Court noted in *Sierra Club v. Morton*, the focus of any standing analysis is a showing of injury in fact. 405 U.S. 727, 732 (1972). This is where this Court begins its analysis. As noted above, it is clear that in the present case Plaintiff H/N has alleged an injury in fact, namely the loss of its liquor license and the subsequent closure of its business as a restaurant and bar, sufficient to give it a concrete interest in the outcome. In *Park View Heights Corp. v. City of Black Jack*, the Eighth Circuit held that an economic interest gave the corporate plaintiffs "a personal stake in the outcome of the

controversy." 467 F.2d 1208, 1213. Plaintiff H/N has satisfied this first requirement to assert the legal rights of a third party.

The Eighth Circuit further held, addressing the second requirement of the exception, that although a constitutional right is ordinarily a personal right, "this is only a rule of practice, which will not be followed where the identity interest between the party asserting the right and the party in whose favor the right exists is sufficiently close." *Id.* The Eighth Circuit went further than is necessary in the case at bar and allowed the corporate plaintiffs to raise the constitutional rights of the individuals even when the individuals themselves were a party to the action. *Id.* at 1214 ("the corporate plaintiffs can assert the individual plaintiffs civil rights under 42 U.S.C. §§ 1981 and 1982, and the individual plaintiffs can assert their own civil rights under the same sections."). In a Sixth Circuit decision directly on point, the court found that a councilman's aid had a sufficiently close working relationship with the councilman to be able to assert the councilman's rights. *Camacho*, 317 F.3d at 159-160. The councilman's aid alleged that he was fired because of the councilman's vote at a city council meeting. *Id.* at 160. The Second Circuit, in determining that a close relationship existed, pointed to the fact that "Camacho [plaintiff] had worked on all of Fuentes' [the councilman] political campaigns from 1986 until Fuentes left the area in 1999, serving in various capacities . . . , indeed, Camacho was the best man at Fuentes' wedding." *Id.*

at 157. In the same way Plaintiff H/N had a close relationship with Plaintiff Brian Hodak, who was one of the operators of the C. Blake's Bar and Grill, and was married to Karla Hodak, the sole shareholder of Plaintiff H/N. Plaintiff Brian Hodak was involved in the daily operation of the Bar, and was the subject of some of the alleged retaliatory incidents that resulted in the citation of points against the Bar's liquor license. This satisfies the second requirement, Plaintiff H/N has a sufficiently close relationship with Plaintiff Brian Hodak, that Plaintiff H/N will be a zealous advocate of the legal rights at issue in this suit. *Park View Heights Corp.*, 467 F.2d 1208, 1213.

Lastly, Plaintiff H/N must show that Plaintiff Brian Hodak was hindered from protecting his own interests. *Powers*, 499 U.S. at 411. The court in *Camacho* further held that the councilman was "inhibited from seeking redress for these injuries because of the absence of any direct economic harm to him from [the plaintiff's] firing." 317 F.3d at 160. Again, the case is exactly on point with the present facts. Plaintiff Brian Hodak cannot assert this claim because of the lack of economic injury to himself. In his complaint Plaintiff Brian Hodak only alleges "extreme mental and emotional distress, humiliation and outrage." *Pl. Comp.*, ¶42. The economic harm that resulted from Defendants alleged conduct was suffered by Plaintiff H/N, therefore preventing Plaintiff Brian Hodak from protecting his own first amendment rights. Additionally, the focus is on an injury suffered by the plaintiff, sufficient to make the

plaintiff an effective advocate of the legal rights. *See Park View Heights Corp.*, 467 F.2d at 1214 (Holding that corporate plaintiffs had suffered an injury, and therefore had standing, even though the individuals who's [sic] rights were violated were also a party to the action.); *see also Sierra Club*, 405 U.S. at 732 ("the question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in the adversary context. . . ."). Therefore Defendants contention that Plaintiff H/N has alleged facts that as a matter of law do not state a claim because it asserts the rights of a third party, is unfounded.

B. ADVERSE ACTION

In order to prevail on a claim of retaliation, the Plaintiff must show that "the government official took *adverse action* against him that would chill a person of ordinary firmness from continuing in the activity." *Revels*, 382 F.3d at 876 (emphasis added). Defendants argue that Plaintiff H/N did not suffer from an "adverse action" because H/N failed to exhaust its administrative remedies after the Bar's liquor license was revoked. Citing *Okruhlik v. University of Arkansas*, Defendants assert that the Board of Aldermen's ("Board") decision cannot constitute an adverse action because it was not "final." 395 F.3d 872 (8th Cir. 2005). In *Okruhlik*, the Eighth Circuit analyzed a claim of First Amendment retaliation in the context of employment law. A University of Arkansas professor

sued the University after she was denied tenure. The tenure process at the University was multi-layered, and after being denied tenure at various stages of the process, she filed suit instead of making the final appeal to the chancellor or president. The Eighth Circuit upheld the district court's finding that a university professor did not establish that she suffered an "adverse employment action" because she failed to complete all the levels of the tenure review process and never received a final decision from the University's president. *Id.* at 877-78. The court reasoned that "a university should have the opportunity to correct errors through its complete internal appeals process that precedes its final decision." *Id.* at 879.

This Court finds *Okruhlik* inapposite. While the Board's decision to revoke the Bar's liquor license was appealable in a state court, the Board's decision was not an "internal" or "intermediate" step in the liquor revocation process for the City. The holding in *Okruhlik* was based on plaintiff's failure to complete the entire internal review process at the University; indeed, the court specifically noted that if a denial of tenure is official, it can be an adverse employment action. *Id.* Unlike *Okruhlik*, Plaintiff H/N completed the City's full internal process relating to liquor revocations before filing suit. *Okruhlik* is further distinguishable because that First Amendment retaliation in the employment context is quite different than First Amendment retaliation in other settings. The standard for what constitutes an "adverse

employment action" is different than the standard relating to "adverse actions" in non-employment settings. An "adverse employment action" is a "material employment disadvantage such as termination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects." *Id.* at 879; *see also Bechtel v. City of Belton, MO*, 250 F.3d 1157, 1162 (8th Cir. 2001). The *Okruhlik* Court analyzed the plaintiff's retaliation claim based on the standard for an "adverse employment action."

The instant case does not relate to retaliation against Plaintiff H/N by changing the terms of Plaintiff's employment. In non-employment contexts, a person suffers an adverse action if a reasonable person of ordinary firmness would be deterred from continuing to exercise his right to free speech. *Garcia v. City of Trenton*, 348 F.3d 726, 728-29 (8th Cir. 2003). In *Garcia*, the court found that plaintiff had suffered an adverse action because she received four parking tickets in retaliation for complaining about bicycles unlawfully riding on the sidewalk in front of her store. The facts are more dramatic in this case. Here, Plaintiff H/N alleges that Defendants threatened Plaintiffs Brian and Karla Hodak, that if Plaintiff Brian Hodak did not stop writing derogatory articles about city officials, that measures would be taken to revoke the Bar's liquor license, and indeed, the liquor license was eventually revoked by the City. This Court finds that H/N's failure to file suit in state court does not change the fact that Plaintiff H/N has

alleged facts upon which a jury could find that the speech of a person of ordinary firmness would have been chilled by Defendants' actions. Therefore judgment on the pleadings is not appropriate on this basis.

IV. CONCLUSION

Plaintiff has alleged facts under Count I of their Third Amended Complaint, which state a cause of action for First Amendment retaliation under 28 U.S.C. § 1983. Plaintiff H/N has standing to bring suit against the Defendant: Plaintiff H/N has alleged that Plaintiff Brian Hodak engaged in activities protected under the First Amendment, that Plaintiff Brian Hodak was retaliated against because of these protected activities, that Plaintiff Brian Hodak and Plaintiff H/N have a close relationship, that Plaintiff H/N suffered economic loss as a result of the retaliation, and that Plaintiff Brian Hodak can not assert his own legal claim because Plaintiff H/N did not suffer any economic harm. If Plaintiff H/N is successful in proving these allegations, then it may recover for a claim of First Amendment retaliation. Furthermore, the Defendants' argument that Plaintiff Brian Hodak did not exhaust all available remedies because it failed to appeal the Liquor Commissions decisions in state court is unpersuasive. It is not necessary for a party to appeal a final agency decision in state court, before that party can bring an action in federal court for retaliation.

Accordingly,

IT IS HEREBY ORDERED that Defendants Motion for Judgment on the Pleadings Against Plaintiff H/N Planning & Control Inc. on Count I of Plaintiffs' Second Amended Complaint [doc. #137] is **DENIED as moot**.

IT IS FURTHER ORDERED that Defendants Motion for Judgment on the Pleadings Against Plaintiff H/N Planning & Control Inc. on Count I of Plaintiffs' Third Amended Complaint [doc. # 145] is **DENIED**.

Dated this 20th day of October, 2006.

/s/ E. Richard Webber
E. RICHARD WEBBER
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-2590

Brian Hodak, et al.,

Appellees

v.

City of St. Peters and Tom Brown, Mayor,

Appellants

Timothy Kaiser, Sgt., DSN 184, et al.,

Appeal from U.S. District Court for the
Eastern District of Missouri – St. Louis
(4: 04-cv-01099-ERW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 22, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
/s/ Michael E. Gans

App. 37

Appeal No.: 07-2590

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIAN HODAK and
H/N PLANNING & CONTROL, INC.,

Plaintiffs/Appellees,

v.

CITY OF ST. PETERS and
TOM BROWN, MAYOR

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT EASTERN DISTRICT OF MISSOURI

The Honorable E. Richard Webber,
United States District Judge

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING AND/OR REHEARING EN BANC

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I. BASIS FOR REHEARING

The panel decision is in undeniable conflict with the following precedent of the Eighth Circuit and the United States Supreme Court:

Park View Heights Corporation, et al. v. The City of Black Jack, 467 F.2d 1208 (8th Cir. 1972) – following *Sierra Club v. Morton*, 405 U.S. 727 (1972), allowing third party standing even where the rights-violation-holder participated in the suit – distinct and palpable injury to third party creates standing.

Naucke v. City of Park Hills, 284 F.3d 923 (8th Cir. 2002) – following *Warth v. Seldin*, 422 U.S. 490 (1975) [in the District Court] – allowing third party standing even where the rights-violation-holder participated in the suit – distinct and palpable injury to third party creates standing.

Ben Oehrleins & Sons & Daughter v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997) – applying and analyzing standing under *Warth v. Seldin*, 422 U.S. 490 (1975), but denying third party standing where right-holder was involved in suit only because "no special relationship" between the litigants (*Warth*) and third party was not in the "zone of interests" of the Commerce Clause. (*Bennett v. Spear*, 520 U.S. 154, 1997)

The panel decision applied a standing analysis under *Powers v. Ohio*, 499 U.S. 400 (1991), which analyzes third party standing when the right-holder is unavailable, unwilling, or hindered in participating in the lawsuit. *Powers* has no application when the right-holder willingly participates and the third party

has suffered a distinct "injury-in-fact", directly traceable to the rights violation (*Warth*).

The panel decision was the first application of *Powers* in the Eighth Circuit. It was wrongly applied, departed from the precedent of this Circuit, created clear conflicts with the precedent, and now, must be reversed.

II. SUMMARY OF THE CASE

A. The Claims

This suit was filed pursuant to 42 U.S.C. § 1983. Brian Hodak sought damages for mental and emotional distress for violation of his exercise of free speech under the First Amendment. H/N Planning & Control, Inc. sought economic damages it suffered as a direct result of the violation of Brian Hodak's free speech.

B. The Critical Facts

Mayor Tom Brown threatened Karla Hodak, wife of Brian, and sole shareholder of H/N Planning & Control, Inc. with "tell your fucking husband to shut up or you are going to lose your liquor license". H/N thereafter, had its liquor license revoked by the City of St. Peters. H/N Planning was the target of retaliation by the mayor and the City of St. Peters because of Brian Hodak's speech.

C. The Verdicts

The case was tried before a jury (twice successfully). In the second trial, the jury found that Brian Hodak's free speech rights were violated, but awarded no damages for mental or emotional distress. On the claim of H/N, the jury found that its liquor license was revoked by the City in retaliation for Brian Hodak's free speech expressions. The jury awarded $375,000.00 in actual damages because H/N was put out of business, and $1 million dollars in punitive damages against Mayor Tom Brown individually for his conduct.

D. The Panel's Analysis of Third Party Standing for H/N

The Panel's Opinion, though acknowledging the precedent of and constitutional analysis of standing in *Warth v. Seldin*, moved to a prudential standing analysis in *Powers v. Ohio*.[1] The Panel cited four (4)

---

[1] The Panel Opinion references that "the parties urge us to apply the three-part analysis in *Powers*". Appellees are confused to this reference. Appellees have never cited or urged *Powers*. It appears no where in Appelles' [sic] brief or in any document in the District Court addressing standing. Appellees have always maintained that standing in this case was easily resolved because of the precedent in *Park View Heights Corporation, et al. v. The City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *Naucke v. City of Park Hills*, 284 F.3d 923 (8th Cir. 2002); and, *Warth v. Seldin*, 422 U.S. 490 (1975). Appellees were comfortable in that reliance because of the hierarchy of precedent. District courts are bound by the panel decisions of this Court, *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir. 2000),

(Continued on following page)

cases in sister circuits applying Powers and denying third party standing because the rights-violation-holder, or injured party, was participating as a litigant in the suit. The clear distinction, however, is that in each of those cases the third party alleged no "distinct palpable injury" to itself for standing under *Warth*, or there was only a "incidental congruity of interest" under *Warth* or the precedent of those circuits.

The Panel's conclusion was that because Brian Hodak participated in this lawsuit, H/N Planning & Control had no standing to sue for its distinct injuries. Finding no standing, there was no jurisdiction. Participation is not the issue. Participation is allowed when the damages are distinct, concrete and a direct result of the rights violation.

III. THE CLEAR CONFLICT OF THE PANEL DECISION

A. *Park View Heights*

"We believe that the corporate plaintiffs also have the standing to question certain alleged statutory violations. . . . the corporate plaintiffs can assert the individual plaintiffs' civil rights under 42 U.S.C. Secs. 1981 and 1982, and the individual plaintiffs can assert their own civil rights under the same sections."

---

and future panels are bound to follow existing panel decisions. *Anastasoff* at 905.

Park View Heights Corporation, et al. v. The City of Black Jack, 467 F.2d 1208, 1214 (8th Cir. 1972).

"Though generally speaking, the right to equal protection is a personal right of individuals, this is 'only a rule of practice', *Barrows v. Jackson*, 346 U.S. 249, 257, 73 S.Ct. 1031, 1035, 97 L.Ed. 1586, which will not be followed where the identity of interest between the party asserting the right and the party in whose favor the right directly exists is sufficiently close." *Id.* at 1213.

"Surely, such an economic interest satisfies the tests for standing to litigate constitutional violations, recently announced again [sic] *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). This economic interest gives both plaintiff corporations "a personal stake in the outcome of the controversy." *Sierra Club v. Morton*, supra at 732, 92 S.Ct. at 1364, quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

Park View Heights has never been overruled. The Panel's decision did not distinguish it as inapplicable, or even reference it.

B. *Naucke*

In *Naucke v. City of Park Hills*, 284 F.3d 923 (8th Cir. 2002), the plaintiffs consisted of Theresa Naucke, her husband Charles Naucke, and brother John Duvall. Theresa was the one exercising her free speech rights. Charles and John were employed by

the city and discharged from their employment in retaliation for Theresa's speech expressions. Theresa brought claims for mental and emotional distress (participating in the suit). Charles and John brought claims for retaliatory discharge. Theresa's claim was eliminated by summary judgment. Charles and John prevailed in the trial court and on appeal in this Court.

In the trial/district court, the defendants challenged the standing of Charles and John. The district judge, the Honorable Donald Stohr, analyzed the issue as follows:

> "Defendants cite language from *Warth v. Seldin*, 422 U.S. 490, 499 (1975), emphasizing the requirement that a plaintiff himself have suffered the injury he seeks to redress. This principle is not fatal to Charles' and John's claims, because each clearly alleges injury to himself, namely the loss of his job. The principle invoked by defendants does not address the legal twist presented by Charles' and John's claims, namely a scenario in which one plaintiff's claimed injury is allegedly inflicted in retaliation for the exercise of another plaintiff's constitutional rights. *Warth* itself recognizes that:
>
> > [S]o long as [the injury] requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights

> and interests of others, and, indeed, may invoke the general public interest in support of their claim." (*Naucke v. City of Park Hills*, Eastern District of Missouri, Eastern District, Case No. 4:99CV455-DJS, Document #60).

The Panel's decision does not address *Naucke*. Given the Panel's decision that participation of the right-holder eliminates jurisdiction over any other party, then *Naucke* would have to be overruled on jurisdictional grounds. It has not been.

C. *Ben Oehrleins & Sons & Daughter*

In *Ben Oehrleins & Sons & Daughter v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997), this Court, six (6) years **after** the *Powers'* decision, analyzed third party standing in both its constitutional and prudential dimensions. It was directly on point where two (2) parties were involved, one (1) seeking third party standing, and the right-holder participated. This Court's analysis is worth repeating here:

> "Standing is the constitutional requirement, imposed by the "cases or controversies" provision of Article III, that a plaintiff must allege a judicially cognizable and redressable injury in order to pursue a lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S.Ct. 2130, 2135-36, 119 L.Ed.2d 351 (1992). To establish standing, a plaintiff must demonstrate three minimal

constitutional requirements: (1) an "injury in fact" that is both (a) concrete and particularized, and (b) actual or imminent, rather than conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant's conduct; that is, that the injury is "fairly traceable" to the challenged action; and (3) that it is likely that a favorable decision will redress the injury. *Id.* at 560-61, 112 S.Ct. at 2136-37.

Even if a plaintiff meets the minimal constitutional requirements for standing, there are prudential limits on a court's exercise of jurisdiction. These prudential limits are judicially imposed and "are 'founded in concern about the proper – and properly limited – role of the courts in a democratic society'." *Bennett v. Spear*, ___ U.S. ___, 117 S.Ct. 1154, 1161, 137 L.Ed2d 281 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975)). Two prudential limits are relevant to this case. First, only in exceptional cases may a party have standing to assert the rights of another. *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205. This "third-party standing" rule thus "normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves". *Id.* at 509, 95 S.Ct. at 2210. In addition, plaintiffs alleging a violation of a constitutional or statutory right must demonstrate that they are within the "zone of interests" of the particular provision invoked. *Bennett*, ___ U.S. at ___, 117 S.Ct. at 1161. To satisfy this

> prudential requirement, a plaintiff must show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question". *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed2d 184 (1970); *see also Bennett*, ___ U.S. at ___, 117 S.Ct. at 1161."

Ultimately, this Court denied third party standing in *Ben Oehrleins & Sons & Daughter*. It was denied for two (2) reasons. First, because the Court found only an "incidental congruity of interest" and "no special relationship" between the third party and the right-holder, citing *Warth* at 510. *Id.* at 1381. Second, because the third party was not within the "zone of interests" of the Commerce Clause. *Id.* at 1381, 1382.

The point is that *Warth* applied in this multi-party analysis, not *Powers*. Distinct injuries were alleged by distinct parties. Participation of the right-holder or injured party was not the issue, nor should it be in multi-party plaintiff analysis.

D. *Warth*

Warth v. Seldin has never been overruled. Its analysis for third-party standing involving multiple plaintiffs has never been determined by the Supreme Court to be outdated, replaced, or supplemented with the elements under *Powers*. The Panel's decision was

not at liberty to avoid the analysis. Our Supreme Court has made it clear, " . . . unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

In addition, the prudential analysis of third party standing in *Warth* is distinct from the prudential considerations of third party standing in *Powers*. In *Warth*, a case involving five (5) distinct party plaintiffs, the Court held in that multi-party context:

> " . . . the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. In some circumstances, counter-vailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties. *See Unites* [sic] *States v. Raines*, 362 U.S., at 22-23, 80 S.Ct., at 523-24. In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff. *Pierce v. Society of Sisters*, 268

> U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S.Ct. 400, 404, 24 L.Ed.2d 386 (1969). See generally Part IV, infra. Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. E.G., *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. E.g., *Sierra Club v. Morton,* supra, 405 U.S., at 737, 92 S.Ct., at 1367; *FCC v. Sanders Radio Station*, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869 (1940)."
> *Warth* at 500, 501.

The prudential standard in *Powers* is clearly distinct from *Warth's* consideration of multiple parties. In *Powers*, the Court created a third prudential consideration of "hindrance" of the injured party from participating. "Hindrance" was defined as the injured party's unwillingness to participate, lack of stake in the outcome, being unidentifiable or undesirable in

pursuing the litigation. *Powers* at 414, 415. This third prong clearly and unmistakably refers to an absent injured party, which in turn, by definition, means no multi-party plaintiff analysis. In short, *Powers* does not apply.

IV. THE DISTRICT COURT'S ANALYSIS OF H/N'S THIRD PARTY STANDING UNDER *POWERS*

The Panel's decision does recognize that the district court applied *Powers*. Though the district court reached the right result – allowing standing, it did so for the wrong reason – applying *Powers*.

In the district court's third party standing analysis, the district court held, "The Eighth Circuit went further than is necessary in the case at bar and allowed the corporate plaintiffs to raise the constitutional rights of the individuals even when the individuals themselves were a party to the action, citing *Park View Heights Corp. v. City of Black Jack*, ("the corporate plaintiffs can assert the individual plaintiffs civil rights under 42 U.S.C. §§ 1981 and 1982, and the individual plaintiffs can assert their own civil rights under the same sections.")." Joint Appendix, Volume II, page 484. The analysis should have ended there, under *Warth*.

The district court, however, thereafter intertwined the analysis of *Powers*' "hindrance" requirement with *Park View Heights*. Joint Appendix,

Volume II, page 485. The result was to have a conflict between the prudential standards in *Warth* and those in *Powers*. Nonetheless, the district court's conclusion was correct, H/N had third party standing even though Brian Hodak was participating in the lawsuit.

V. CONCLUSION

H/N Planning & Control, Inc. had third party standing to bring the claims for its distinct and directly traceable injuries to the free speech violations of Brian Hodak. The district court had reached the right result in allowing standing, its analysis of the prudential standards in *Powers*, however, was incorrect. The Panel's decision in this case has unmistakably created an irreconcilable conflict in the precedent of the Eighth Circuit, as well as the United States Supreme Court.

The Panel should set aside its decision and opinion, rehear the case, and affirm the judgment below. In the alternative, the full Court should set

aside the decision and opinion of the panel, and set the case for a new hearing in front of the full Court.

Respectfully submitted,
BAGSBY & LEE, LLC

/s/ Larry A. Bagsby

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Attorney for Plaintiffs-Appellees,
Brian Hodak and
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Dated: August 8, 2008

CERTIFICATE OF SERVICE

I certify that on August 8, 2008, I caused to be served two (2) copies of the Plaintiffs-Appellees' Petition for Rehearing and/or Rehearing En Banc on counsel for the Defendants-Appellants herein, by placing said copies in the care of the United States Postal Service, via first-class mail, addressed to the following counsel of record for Defendants-Appellants:

David T. Hamilton
Matthew J. Fairless
Hazelwood & Weber, LLC
200 North Third Street
St. Charles, MO 63301

The undersigned also certifies that a true and correct copy of the foregoing was served this 8th day

of August, 2008, by means of electronic filing through the CM/ECF system, as agreed between the parties.

/s/ Larry A. Bagsby

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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August 26, 2008

Mr. Matthew Joseph Fairless
Mr. David Taylor Hamilton
HAZELWOOD & WEBER
200 N. Third Street
St. Charles, MO 63301-0000

RE: 07-2590
Brian Hodak, et al v. City of St. Peters, et al

Dear Counsel:

A petition for rehearing has been filed by the appellees in the above case. I have been instructed by the court to request you to respond to the petition for rehearing by the panel.

Please electronically file your response, limited to ten pages, by September 5, 2008. If you have any questions concerning the court's request, please contact this office.

Michael E. Gans
Clerk of Court

DMH

cc: Mr. Larry Alan Bagsby

District Court/Agency Case Number(s):
4:04-cv-01099-ERW

Supreme Court, U.S.
FILED
JAN 21 2009
OFFICE OF THE CLERK

117 (2)

No. 08-791

In The
Supreme Court of the United States

H & N PLANNING AND CONTROL, INC.,
Petitioner,

v.

CITY OF ST. PETERS, MISSOURI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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January 21, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit correctly determined that Petitioner lacked third-party standing to advance a First Amendment retaliation claim under 42 U.S.C. § 1983 where Petitioner conceded it engaged in no First Amendment activity and where the rights holder, Brian Hodak, failed to appeal the District Court's judgment finding that he had suffered "no actionable constitutional violation"?

DISCLOSURE STATEMENT

Respondents herein are the City of St. Peters, Missouri (the "City") and its former mayor, Thomas Brown (collectively "Respondents"). As the City is a governmental entity, no disclosure per Rule 29.6 is required.

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INTRODUCTION

The Petition presents no compelling reason supporting exercise of this Court's jurisdiction. Rule 10.[1] Petitioner does not suggest the opinion of the Eighth Circuit is in conflict with the decision of another United States Court of Appeals, but concedes the Eighth Circuit relied "upon a trend within other circuits." Petition at 7.[2] Petitioner acknowledges the Eighth Circuit applied this Court's decision in Powers v. Ohio, 499 U.S. 400 (1991), but complains the Eighth Circuit misapplied Powers to the facts of this case. Certiorari generally does not lie where the petitioner complains of misapplication of the applicable precedent. Rule 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

The Petition should be denied because the Eighth Circuit's July 30, 2008 opinion (the "Opinion") correctly applied this Court's precedent, stated in Warth v. Seldin, 422 U.S. 490 (1975) and Powers v. Ohio, 499 U.S. 400 (1991), to deny Petitioner third-party standing. Petitioner concedes it engaged in no First Amendment activity. The Eighth Circuit held Petitioner lacked standing because the rights holder who engaged in First Amendment activity—Brian Hodak—was not hindered in pursuing his retaliation claim and because the District Court ruled Brian did

---

[1] The Rules of the Supreme Court of the United States are referred to herein simply as "Rule."

[2] II/N Planning & Control's Petition for Writ of Certiorari is referred to herein as "Petition" and cited as "Pet."

not suffer an "actionable constitutional violation." Opinion, Appendix to Pet. (herein "App."), p. 8. Brian did not appeal the District Court judgment against him. The Opinion correctly applies this Court's precedent and is consistent with decisions of the United States Court of Appeals for the First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits on similar facts.

COUNTERSTATEMENT OF THE CASE

The facts of this case are set forth in the Opinion in a light most favorable to Petitioner. Petitioner's Statement of the Case (Pet. 2-6) omits two important facts. The first omitted fact is that the District Court entered judgment against Brian on his claim for First Amendment retaliation because it concluded Brian did not suffer an "actionable constitutional violation." App. 8. The second omitted fact is that Brian did not appeal that adverse judgment. Id.

At trial, the jury found in Brian's favor but awarded no damages. Respondents moved for judgment as a matter of law on Brian's claim, and the District Court entered judgment against Brian, holding the evidence at trial showed the alleged acts of retaliation were "not sufficiently severe so as to raise to the level of an actionable constitutional violation." Id. Brian did not appeal this ruling. Id. In addition to finding that Petitioner did not satisfy the Powers third-party standing requirements, the Eighth Circuit concluded "we would decline to extend third-party standing to H/N to assert Brian's nonexistent legal claim." Id. at 16.

Petitioner ignores the District Court's conclusion that Brian suffered no actionable rights violation as well as the fact that Brian did not appeal the adverse judgment. Petitioner also misstates the facts. Petitioner asserts "Brian and Karla had obtained a 1.5 million dollar judgment against Defendants." Pet. 12. This is an incorrect factual statement. Brian did not obtain any judgment; rather, judgment as a matter of law was entered in favor of Respondents on his claim. Karla did not obtain a judgment; she was not a party to the case at the time of the second trial and did not submit any claims to the jury. Petitioner also asserts that "judgment was not entered on behalf of the claim of Brian Hodak, based upon damages." Pet. 11. In fact, as the Eighth Circuit observed, "[b]ecause Brian did not suffer an 'actionable constitutional violation,' the district court concluded that [Respondents] were entitled to judgment as a matter of law with respect to Brian's claim." App. 8.

REASONS FOR DENYING THE PETITION

I. BRIAN HODAK SUFFERED "NO ACTIONABLE CONSTITUTIONAL VIOLATION." IN LIGHT OF THE UNAPPEALED DISTRICT COURT JUDGMENT, THERE CAN BE NO ERROR IN DENYING PETITIONER STANDING TO ASSERT BRIAN HODAK'S NONEXISTENT FIRST AMENDMENT RIGHTS.

As stated *supra*, judgment as a matter of law was entered in favor of Defendants and against the rights holder, Brian, on his First Amendment retaliation claim.

Brian suffered no deprivation of rights; as recognized by the Eighth Circuit, his First Amendment rights were not violated. Brian zealously advocated his claim and lost. The Eighth Circuit correctly concluded "Brian has no rights that [Petitioner] may assert, and we would decline to extend third-party standing to [Petitioner] to assert Brian's nonexistent legal claim." App. 16.

II. THE OPINION OF THE EIGHTH CIRCUIT IS A PROPER APPLICATION OF THIS COURT'S APPLICABLE PRECEDENT STATED IN POWERS V. OHIO AND IS CONSISTENT WITH THE APPLICATION OF POWERS BY OTHER CIRCUITS. THE OPINION DOES NOT DECLARE ANY "ABSOLUTE RULE" AS SUGGESTED BY PETITIONER, BUT RATHER CORRECTLY APPLIES THE POWERS THREE-PART TEST TO DENY STANDING TO PETITIONER.

Petitioner's Question Presented suggests the Eighth Circuit's application of Powers v. Ohio conflicts with this Court's opinion in Warth v. Seldin. The Eighth Circuit's application of Powers is consistent with Warth and consistent with the holdings of the other federal circuits addressing similar facts.

A. The Eighth Circuit Properly Applied This Court's Precedent On Third-Party Standing

Petitioner contends that Warth and Powers are inconsistent, and that applying Warth to the facts of this case compels a different outcome. According to Petitioner, this Court, in Warth, "made clear that

when government action directly or indirectly violates the rights of third parties, then multi-party plaintiff claims are allowed." Pet. 10. Petitioner asserts that its case "could not be more clearly aligned with that precedent." Id.

Petitioner suggests that because it alleged an injury, it necessarily had standing. Pet. 10. Warth contradicts Petitioner's logic: "[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." 422 U.S. at 499. In Warth, this Court specifically held "the claim of these petitioners falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." Id. at 509.

In Warth, local taxpayers claimed third-party standing to challenge local zoning laws excluding low and moderate income persons. This Court recognized that taxpayers of the local government were not "themselves subject to [allegedly unconstitutional] zoning practices" and that their claim rested on the violation of "constitutional and statutory rights of third parties, namely, persons of low and moderate income who are said to be excluded." Id. at 509, 510. In addressing whether the taxpayers established an exception to the prudential limitations of standing, this Court outlined a third-party standing test that, sixteen years later in Powers, it would apply again. The Warth Court held that "[n]o relationship, other than an incidental congruity of interest, is alleged to

exist between the ... taxpayers and persons who have been precluded from living" within the locality. Id. at 510. Further, this Court held "there is no indication that persons who in fact have been excluded ... are ***disabled from asserting their own right in a proper case***." Id. at 510 (emphasis supplied).

One year after Warth, this Court again addressed the issue of third-party standing in Singleton v. Wulff, 428 U.S. 106 (1976). In that case, physicians challenged the constitutionality of a law they claimed violated the constitutional rights of their patients. This Court found a sufficient "injury-in-fact" (id. at 112-13), a sufficiently close "relationship between the litigant and the third party," (id. at 115), and a "genuine obstacle" to the third party's own litigation. Id. at 115-16.

In Powers v. Ohio, the Supreme Court specifically and clearly relied on Singleton as the prior decision from which it derived the three criteria used in evaluating third-party standing. 499 U.S. at 410-411 (quoting Singleton, 428 U.S. at 112, 113-116). The Powers Court held that to allow third-party standing, "three important criteria" must be met: 1) an "injury in fact"; 2) a "close relation to the third party"; and 3) a "some hindrance to the third party's ability to protect his or her own interests." Id. at 411.

In Powers, this Court considered "whether a criminal defendant has standing to raise the equal protection rights of a juror excluded from service." Id. at 410. In analyzing the "hindrance" prong, this Court assessed the "likelihood and ability" of the excluded jurors to pursue their own claims. Id. at 414. The Court assessed the "barriers to a suit" faced by a

hypothetical juror. Id. at 414 ("[A] juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights.")

The Eighth Circuit faced a far simpler task in this case in assessing the likelihood and ability of the rights holder, Brian, to assert his own rights. "Brian had no practical obstacles that prevented him from bringing his First Amendment claim. In fact, he brought his own claim before the district court." App. 13. Brian "voluntarily withdrew himself as a named plaintiff in the first trial, but prior to the second trial, in the third amended complaint, Brian asserted his First Amendment retaliation claim yet again." Id. Brian "persisted in the claim throughout the second trial." Id. at 13-14. As acknowledged by Petitioner, "[e]very incentive in the world existed" for Brian to pursue his claims. Pet. 10.

Petitioner contends that in Kowalski v. Tesmer, 543 U.S. 125 (2004), this Court "reaffirmed the principle that 'prudential standards' are not 'absolute,'" arguing that the Eighth Circuit applied the third-party standing test as an "absolute rule." Pet. 8 (quoting Kowalski at 129, 130). Petitioner misreads Kowalski and this Court's third-party standing jurisprudence. In Kowalski, this Court recognized the general rule "that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties," and confirmed that "[w]e have not treated this ["general rule"] as absolute." 543 U.S. at 129-130. In Kowalski, this Court recognized that third-party standing constitutes an "exception" to the general rule which requires a party to assert his or her own legal

rights and interests. The Court noted "there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." Id. at 129-130. Ultimately, the Kowalski Court reaffirmed the long-standing position of the Court: "[W]e have not looked favorably upon third-party standing." Id. at 130.

Third-party standing of the type asserted by Petitioner is an "exception" to the general rule that requires a party "assert his own legal rights and interests." In order to permit the exception and allow third-party standing, the Court requires a showing of "a 'close' relationship with the person who possesses the right" and evaluates "whether there is a 'hindrance' to the possessor's ability to protect his own interests." Id. at 130 (citing to Powers). The Kowalski Court applied Powers and found that plaintiffs failed to satisfy both the close-relationship and hindrance prongs.

In analyzing the "hindrance" prong, this Court in Kowalski rejected the argument of plaintiffs that pro se criminal defendants were "hindered" in protecting their constitutional rights to counsel allegedly abridged under the Michigan laws governing criminal appeals. Id. at 131. The Court cited to examples where pro se criminal defendants had, in fact, pursued challenges through the court system. This Court noted that three indigent criminal defendants were originally plaintiffs in the action, but their claims were dismissed because they "had ongoing state criminal proceedings and ample avenues to raise their constitutional challenge in those proceedings." Id. at 133; see also Mainstreet Organization of Realtors v. Calumet City, 505 F.3d 742, 747 (7th Cir. 2007)

(Posner, J.) (citing Kowalski and stating: "As there is no hindrance to the primary victims' enforcing their rights, there is no reason to allow the brokers into the litigation arena.").

The Eighth Circuit's Opinion is perfectly consistent with this Court's opinions in Warth, Singleton, Powers and Kowalski.

Furthermore, the Eighth Circuit did not go beyond what this Court's precedent holds. Petitioner contends the Eighth Circuit fashioned an "absolute rule" that holds "participation of the one whose rights were violated eliminates all jurisdiction over all other parties." Pet. 8. No absolute rule was formulated. The Eighth Circuit carefully reviewed whether Petitioner adequately presented the "two additional showings" required by the third-party standing exception. App. 11-14. The Eighth Circuit found that Petitioner failed to establish the hindrance prong. It clearly found "Brian had no practical obstacles that prevented him from bringing his First Amendment claim." App. 13. As noted by the Eighth Circuit, Brian provided compelling evidence that no "practical obstacles" confronted him by bringing "his own claim before the district court." Id.

B. The Eighth Circuit's Application Of This Court's Third Party Standing Jurisprudence Is Consistent With Other Circuits

The Eighth Circuit correctly recognized that Brian, the rights holder, faced no hindrance to protecting his own interests. Consistent with prior opinions of the

First, Third, Eighth, Ninth, and Eleventh Circuits,[3] the Eighth Circuit recognized that "if a third party actually asserts his own rights, no hindrance exists, and third-party standing is improper." App. 12.

The Opinion is entirely consistent with prior circuit precedent, Ben Oehrleins and Sons v. Hennepin County, 115 F.3d 1372 (8th Cir. 1997), *cert. denied* 522 U.S. 1029 (1997), where the court held that a group of plaintiffs ("customers of waste haulers") lacked standing to assert the Commerce Clause claims of waste haulers because "prudential considerations bar them from maintaining this action." Id. at 1382. In applying the "third-party standing doctrine described in Warth," the court found the waste haulers suffered no barrier to suit because they "aggressively litigated their own claims," demonstrating "that they are fully capable of asserting their own rights." Id. at 1381. The customers thus failed the third-prong of the Warth/Powers third-party standing test by failing to show some hindrance existed to the waste haulers' ability to act and the likelihood that they would act to protect their own interests.

The Eighth Circuit's application of Powers, as noted in the Opinion, is consistent with the decisions of the First, Third, Ninth, and Eleventh Circuits. See Benjamin v. Aroostook Medical Ctr., Inc., 57 F.3d 101, 106 (1st Cir. 1995) ("Here, the injured party is clearly identified and has sufficient interest in the litigation ... to pursue (and, in fact has pursued) the action."); Philadelphia Marine Trade Ass'n v. Comm'r, 523 F.3d 140, 145 (3rd Cir. 2008) (Here, however, the [third

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[3] As cited in the Opinion, App. 8-10.

party] is not only willing to sue on its own behalf—it *has* sued.") (emphasis in original); Wedges/Ledges of Calif., Inc. v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994) ("[T]he very participation of the [third party] in this suit demonstrates that there is no hindrance to [their] ability to protect their own interests."); and Knight v. Alabama, 14 F.3d 1534, 1554 (11th Cir. 1994) ("[N]ot only was there no obstacle to [the third parties] asserting their rights for themselves, but, in fact, they were already doing so.").

There is no compelling reason for this Court to grant certiorari. The Eighth Circuit applied the well-established test for third-party standing from Powers, which is being consistently applied by the federal circuits. The Petition for Writ of Certiorari should be denied.

C. Misstatements Of Fact Or Law

Pursuant to Rule 15, counsel are directed to bring to this Court's attention any misstatements of fact or law, even if those misstatements are merely "perceived." Petitioner has consistently misstated the holding of the Eighth Circuit, as follows: that it "held that the participation of Brian Hodak in the lawsuit prohibited jurisdiction over any other plaintiff;" that it "held that participation in the lawsuit by the one whose rights were violated, conclusively and absolutely prohibited jurisdiction over any other party;" and that it created an "absolute rule" that "participation of the one whose rights were violated eliminates all jurisdiction over all other parties." Pet. 6-8. Petitioner overstates the Opinion's holding. The Eighth Circuit held that Petitioner lacked standing to assert Brian's First Amendment claim. The holding is thus that one

party (Petitioner) lacked standing to assert one claim (Brian's First Amendment claim).

Petitioner also argues that the Opinion was based solely on the hindrance prong from Powers. The Opinion was not so limited. The Eighth Circuit stated: "Even if we were to conclude that Brian was hindered in asserting his rights, we would conclude that H/N lacks standing nonetheless." App. 15. In evaluating the "hindrance" prong of Powers' third-party standing analysis, the Eighth Circuit assumed, without deciding, that Petitioner had suffered an injury-in-fact and had a sufficiently close relationship with the rights holder, Brian. App. 13. The Eighth Circuit did not affirmatively find that Petitioner had suffered an injury-in-fact or had a sufficiently close relationship with its employee, Brian. Rather, the Eighth Circuit proceeded to the clearest issue, the hindrance prong of the Powers analysis.

The Eighth Circuit further recognized that Petitioner failed to satisfy the initial element of third-party standing—that the underlying rights-holder has a constitutional claim. The District Court concluded Brian suffered "no actionable constitutional violation." Brian did not appeal that judgment. App. 15. Petitioner cannot show Brian suffered any constitutional injury and therefore, as succinctly stated by the Eighth Circuit, "Brian has no rights that H/N may assert, and we would decline to extend third-party standing to H/N to assert Brian's nonexistent legal claim." App. 16.

CONCLUSION

The First Amendment rights holder, Brian Hodak, pursued his claim for three years through two jury trials and was ultimately adjudicated to have suffered "no actionable constitutional violation." Brian did not appeal this ruling. Petitioner, Brian's employer, conceded it did not engage in First Amendment activity. Petitioner failed to present evidence showing that Brian suffered some hindrance in his ability or likelihood to protect his own interests and the Eighth Circuit correctly held on this basis that Petitioner had no standing to assert Brian's "nonexistent" claim.

There is no compelling reason for this Court to grant certiorari. Petitioner does not even argue that one of the reasons set forth in Rule 10 exists, but rather takes issue with the Eighth Circuit's application of a properly stated rule of law. Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,
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